

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/DTS)

THIS DOCUMENT RELATES TO:
17-cv-05274 (*Capone v. 3M Co., et al.*)

**DECLARATION OF DANIEL C. BURKE IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

I, Daniel C. Burke, declare as follows:

1. I am an attorney at Bernstein Liebhard LLP, counsel of record for Plaintiff Helen Capone in the above-captioned matter.
2. I submit this declaration in opposition to Defendants' Motion to Dismiss for Failure to Comply with the Pretrial Order No. 23 and/or Fed. R. Civ. P. 25(a) and 41(b) [Dkt. 1740] filed on February 7, 2019.
3. Mrs. Capone contacted Bernstein Liebhard LLP in January 2016 regarding injuries that were allegedly caused by the Bair Hugger patient warming device.
4. Bernstein Liebhard LLP obtained medical records and billing records pertaining to Mrs. Capone's treatment through its third-party medical records retrieval company. Those records indicated that a Bair Hugger device was used during her initial orthopedic surgery.

5. This case was filed on November 29, 2017 to comply with a possible statute of limitations deadline identified by counsel.
6. A complete PFS was submitted to the Court on February 26, 2018. Defendants did not issue any further Deficiency Notices regarding this PFS.
7. Counsel for Plaintiff diligently keeps its clients aware of developments in this litigation.
8. On February 5, 2019, counsel received an email from Defendants stating that Mrs. Capone has passed away on July 21, 2018. Counsel was not aware of Mrs. Capone's passing prior to the receipt of this email.
9. Counsel attempted to establish contact with Plaintiff's next-of-kin by placing phone calls and sending emails using the contact information Plaintiff provided. As of the filing date of this response, counsel has not been successful in getting in touch with Plaintiff's next-of-kin.
10. The fact that Plaintiff's next-of-kin has not reached out to the counsel indicates that he or she may be inadvertently unaware of the current action.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

DATED: February 21, 2019

/s/ Daniel C. Burke
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